



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

CHRIS CHRISTIE
Governor

P.O. Box 712
Trenton, NJ 08625-0712

ELIZABETH CONNOLLY
Acting Commissioner

KIM GUADAGNO
Lt. Governor

VALERIE HARR
Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

ALEXANDER SALERNO, M.D.,
PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
MEDICAID FRAUD DIVISION,
RESPONDENT.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 00043-15

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter including the Initial Decision, the contents of the OAL case file, the Parties' exceptions. I have also reviewed Petitioner's motion to reopen the hearing pursuant to N.J.A.C. 1:1-18.5(b). Procedurally, the time period for the Agency Head to render a Final Agency Decision is December 28, 2015, in accordance with an Order of Extension. The Initial Decision was received on September 29, 2015.

I hereby ADOPT the findings, conclusions and recommended decision of the Administrative Law Judge (ALJ) in their entirety and incorporate the same herein by

reference. As noted in the Initial Decision, summary disposition may be entered where there is no genuine issue as to any material fact and where the moving party is entitled to prevail as a matter of law. See Initial Decision at pages 2 and 3, citing N.J.A.C. 1:1-12.5 and Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Once the moving party has shown competent evidence of the absence of any genuine issue of fact, the non-moving party must do more than simply create some doubts as to the material facts; it must raise a factual issue substantial enough to sustain a reasonable conclusion in the non-moving party's favor.

Based upon my review of the record, I agree with the ALJ that Dr. Salerno has failed to raise any genuine issue of material fact that would require a hearing in this matter. I also agree that Respondent is entitled to prevail as a matter of law. Thus, I find that the decision to suspend Dr. Salerno pending the resolution of the criminal proceedings is appropriate. For the reasons set forth herein, I am also denying Petitioner's request to reopen the hearing.

On October 10, 2014, the Honorable Stuart A. Minkowitz, JSC, issued an arrest warrant and criminal complaint against Dr. Salerno. The criminal complaint alleged, among other things, that Dr. Salerno received monetary kickbacks for his referral of patients to American Imaging for diagnostic testing and that he failed to disclose violations of State and Federal healthcare regulations to Medicaid, Medicare and private health insurance providers pursuant to N.J.S.A. 2c:21-4-3(A). The information became public knowledge through an October 16, 2014 Attorney General press release and media article. On October 29, 2014, the Office of the State Comptroller, Medicaid Fraud Division (MFD) issued a Notice of Suspension of Payments to Petitioner. On June 3, 2015, Petitioner was indicted by the State Grand Jury on Health Care Claims Fraud, Commercial Bribery and Runner charges.

The New Jersey Medical Assistance and Health Services Act provides that the Director may suspend, debar or disqualify for good cause any provider who is presently participating or who has applied for participation in the Medicaid program. N.J.S.A. 30:4D-17.1(a). Suspension means “an exclusion from State contracting for a period of time, pending the completion of an investigation or legal proceedings.” N.J.A.C. 10:49-11.1(c). The purpose of a temporary suspension from participation in the Medicaid program is not punitive, but to protect the integrity of the program. N.J.A.C. 10:49-11.1(b). Furthermore, the suspension only affects the doctor’s participation in the Medicaid program, but does not prevent the doctor from practicing medicine. See Greenspan v. Klein, 442 F. Supp. 860, 862 (D.N.J. 1977).

42 C.F.R. §445.23 requires State Medicaid agencies to suspend all Medicaid payments to a provider after the agency determines there is a credible allegation of fraud. State regulations also set forth the circumstances in which DMAHS may exclude a provider from participating in the Medicaid program for the purpose of protecting the interest of the New Jersey Medicaid and NJ FamilyCare programs. N.J.A.C. 10:49-11.1(b). Specifically, N.J.A.C. 10:49-11.1(d)(2), (3) and (23) states that any offense indicating a lack of business integrity, a violation of the anti-kickback statute or any other cause affecting responsibility as a provider of Medicaid services as may be determined by DMAHS provide good cause for suspension. The existence of the good cause may be established by: “a judgment or order of an administrative agency, or court of competent jurisdiction, or by a judgment of conviction, grand jury indictment, accusation, or arrest, or by evidence that such violations of civil or criminal law did in fact occur.” N.J.A.C. 10:49-11.1(j)(5) (emphasis added). Here, it is undisputed that Dr. Salerno was arrested and criminally accused by the State of New Jersey of violating state law and that this was the information available to MFD when it made its decision to

suspend Petitioner. MFD's subsequent review of information supporting the Complaint-Arrest Warrant and Indictment of Petitioner does not invalidate MFD's reliance on the Complaint-Arrest Warrant as a credible allegation of fraud. In upholding a motion for summary decision, the New Jersey Superior Court, Appellate Division, held that the fact that a petitioner may have a valid defense to an underlying criminal matter does not negate the fact of the arrest which provides good cause for temporary suspension pursuant to N.J.A.C. 10:49-11.1(j)(3). See Jafrai v. DMAHS, No. A-3273-12T4 (September 5, 2014). As a result, I FIND that DMAHS acted reasonably and within its regulatory authority to suspend Dr. Salerno pending resolution of the criminal proceedings.

Moreover, I FIND that there exists no good cause to exempt the Petitioner from suspension of Medicaid payments. A State may find that good cause exists not to suspend payments, or not to continue a payment suspension previously imposed, to an individual or entity against which there is an investigation of a credible allegation of fraud under certain circumstances. 42 C.F.R. 455.23(e)(4)(ii). One such consideration, argued by Petitioner, takes into account whether the provider serves a large number of beneficiaries within a HRSA-designated medically underserved area. This section contemplates the provision of services to Medicaid beneficiaries. While one of Petitioner's offices is located in a designated HRSA area, there is no shortage of primary care physicians in that location and nothing prevents Petitioner from providing medical services.

I also FIND that there is no reason to reopen the hearing below. Petitioner was represented at the OAL hearing and had a full and fair opportunity to review the evidence presented in conjunction with the Motion for Summary Decision and discovery. Petitioner has not disputed Respondent's Statement of Facts nor presented evidence

contradicting those facts. Rather, Petitioner seeks to reopen the hearing as a means to litigate the underlying criminal matter in the OAL. As stated above, Petitioner may have a valid defense to the underlying criminal matters, but that is not the issue here. Here, the issue is whether Respondent's reliance on the complaint-warrant, signed by Judge Minkowitz and based on probable cause, was sufficient to support the suspension of payments to Petitioner. I FIND that it was and Petitioner has produced nothing to the contrary.

THEREFORE, it is on this 20th day of NOVEMBER 2015,

ORDERED:

That the recommended decision granting Respondent's motion for summary decision is hereby ADOPTED.


Valerie J. Harr, Director
Division of Medical Assistance
and Health Services